

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF DELAWARE

EMERALD EQUIPMENT, . Case No. 01-934 (MFW)  
. Adv. No. 04-53071  
v. .  
. .  
SEA STAR, .  
. 824 Market Street  
Wilmington, Delaware 19801  
Debtors, .  
. May 27, 2004  
. . . . . 9:00 a.m.

TRANSCRIPT OF HEARING  
BEFORE HONORABLE MARY F. WALRATH  
UNITED STATES BANKRUPTCY COURT JUDGE

APPEARANCES:

For the Debtor: Adelman Lavine  
By: ALAN MOLDOFF, ESQ.  
919 North Market Street  
Suite 710  
Wilmington, DE 19801  
  
For the Debtor: Adelman Lavine Gold and Levin  
By: BRADFORD J. SANDLER, ESQ.  
919 North Market Street  
Suite 710  
Wilmington, DE 19801  
  
For Sea Star: Bifferato, Bifferato & Gentilotti  
By: IAN CONNOR BIFFERATO, ESQ.  
Buckner Building  
1308 Delaware Avenue  
P.O. Box 2165  
Wilmington, DE 19899  
  
Audio Operator: Jennifer M. Patone

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J&J COURT TRANSCRIBERS, INC.  
268 Evergreen Avenue  
Hamilton, New Jersey 08619  
E-Mail: [jjcourt@optonline.net](mailto:jjcourt@optonline.net)

(609) 586-2311 Fax No. (609) 587-3599

1 THE COURT: Good morning.

2 MR. MOLDOFF: Good morning, Your Honor. Alan Moldoff  
3 appearing first in connection with the Dockside case.

4 THE COURT: Yes.

5 MR. MOLDOFF: The only thing that's on the agenda  
6 today for Dockside is our eighth interim fee application.  
7 Yesterday I can report to the Court that we filed an amended  
8 plan and amended disclosure statement in an intent to have a  
9 hearing on the disclosure statement scheduled for the July  
10 omnibus hearing date.

11 THE COURT: Okay.

12 MR. MOLDOFF: With respect to the fee application  
13 it's seeking fees for the month of October, November, December  
14 2003. Fee is in the amount of \$4,765, cost, \$993.22, there's  
15 been no objections filed, CNO was filed and we'd just ask that  
16 an order be entered.

17 THE COURT: All right, I have no problems with that,  
18 and I will enter the order.

19 MR. MOLDOFF: Next, on Emerald, I have a form of  
20 order --

21 THE COURT: You can hand it up, that's easier.  
22 Thank you.

23 All right, on Emerald.

24 MR. MOLDOFF: Emerald, the first matter on the agenda  
25 is the application of Emerald to retain Schuts & Bowen

1 (phonetic), they are counsel in Florida, in connection with the  
2 Sea Star litigation. As Your Honor knows, we had filed the  
3 complaints here and they filed a complaint in Florida.

4 THE COURT: Well, I've got a CNO on that and entered  
5 the order?

6 MR. MOLDOFF: The order has been entered?

7 THE COURT: Yes.

8 MR. MOLDOFF: Thank you, Your Honor.

9 Next on the agenda is our fee application. This also  
10 is for October, November and December, fees sought in the  
11 amount of \$5,210.50, cost in the amount of \$404.01, again,  
12 there have been no objections, and we have filed a CNO, and I  
13 have a form of order.

14 THE COURT: Let me look at that. I have no problem  
15 with that one either.

16 MR. MOLDOFF: May I hand this up?

17 THE COURT: You may.

18 MR. MOLDOFF: The last matter is just, again, the  
19 pretrial conference. I think the last time Your Honor  
20 indicated that we would continue it, I think, until there is  
21 some disposition. One, the motion to dismiss that was filed in  
22 this Court, of course, we argued against that.

23 THE COURT: Well, I have taken a look at the papers  
24 and if the parties want, I can issue my ruling on the bench  
25 rather than take the time to write an opinion, if that's all

1 right.

2 MR. MOLDOFF: That's fine.

3 THE COURT: I think the initial issue is what  
4 jurisdiction the Court has over the current adversary whether  
5 it's core or non-core and while many courts have held that the  
6 determination is only whether or not it's a post petition  
7 contract dispute, which would make it core, I think the 3rd  
8 Circuit has a tougher standard as articulated in Halper v.  
9 Halper at 164 Fed. 3rd, 830, where I have to determine whether  
10 -- to determine if it's core, whether invokes a substantive  
11 right provided by Title 11 or if it is a proceeding that by its  
12 nature could only arise in the context of a bankruptcy case.  
13 And I think that it's clear that this contract dispute,  
14 essentially a contract dispute between the parties is not  
15 something that arises under Title 11 or could only arise in the  
16 context of a bankruptcy case. So it's not a core proceeding, I  
17 would have related to jurisdiction over the adversary because  
18 it does involve property rights of the debtor but contrasted  
19 with that there is also a specific provision, 28 U.S.C. 959  
20 that provides that a party that does business with a debtor-in-  
21 possession or trustee has the right to file suit regarding that  
22 dispute in any jurisdiction. So it's clear that there is  
23 concomitant jurisdiction and I'll assume for the purposes of  
24 this decision that Florida has that jurisdiction. So the  
25 question is given that there are two pending cases dealing with



1 the same dispute, one filed by Sea Star in Florida on March  
2 1st, and one filed by the debtor in this court on March 17th,  
3 whether or not I should abstain from hearing this dispute, and  
4 I think that under the 3rd Circuit's articulation of the first  
5 filed rule, that in all cases of concurrent jurisdiction, the  
6 Court would first -- has possession of the subject must decide  
7 it. And that's Crosley v. Hazeltine Corporation, case, 122  
8 Fed. 2d, 925. In this the court, the 3rd Circuit says this  
9 rule should apply, although there is discretion in the second  
10 court, not to apply that rule, it should be limited to rare or  
11 extraordinary circumstances inequitable conduct, bad faith or  
12 forum shopping. There are no allegations of bad faith or  
13 inequitable conduct, but there is an allegation of forum  
14 shopping. The debtor asserts that Sea Star, in essence, filed  
15 the suit in Florida not because it has a legitimate claim  
16 against the debtor, but simply to forestall the filing of a  
17 complaint by the debtor here and that this is clearly a case of  
18 forum shopping. Without going into the merits of the  
19 complaint, I don't think facially it is a case of forum  
20 shopping, again, because 28 U.S.C. 959 allows Sea Star to  
21 commence an action if there's a dispute in any jurisdiction in  
22 the country. So on the face of it -- and again, given that  
23 there is concurrent jurisdiction, I will apply the first filed  
24 rule and I will dismiss this action and let the Florida court  
25 decide it.

1 MR. MOLDOFF: Your Honor, may I just ask is that  
2 dismissal is without prejudice because you know we have filed a  
3 motion to dismiss in Florida pending whatever happens there, I  
4 think that --

5 THE COURT: All right, yes, it is without prejudice  
6 if the Florida court determines that it doesn't have  
7 jurisdiction or its action should be dismissed, the debtor is  
8 free to file here.

9 MR. MOLDOFF: Thank you.

10 All right, I'll grant the motion. Did the order say  
11 without prejudice?

12 MR. MOLDOFF: I believe it did.

13 THE COURT: Yes, it does. So I'll enter the order  
14 that was submitted with the motion.

15 All right.

16 MR. MOLDOFF: Thank you, Your Honor.

17 THE COURT: Thank you, we'll stand adjourned.

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C E R T I F I C A T I O N

I, Johanna LiMato, court approved transcriber,  
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above-entitled matter.

Date: July 1, 2004

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